

91st Legislative Session – 2016

Committee: Senate State Affairs

Wednesday, February 17, 2016

P - Present
E - Excused
A - Absent

Roll Call

P Hunhoff (Bernie)
P Sutton
P Brown
P Holien
P Otten (Ernie)
P Soholt
P Tieszen
P Solano, Vice-Chair
P Cammack, Chair

OTHERS PRESENT: See Original Minutes

The meeting was called to order by Senator Gary Cammack, Chair.

MOTION: TO APPROVE THE MINUTES OF WEDNESDAY, FEBRUARY 10, 2016

Moved by: Brown
Second by: Soholt
Action: Prevailed by voice vote.

SB 106: provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

Presented by: Senator Peters
Proponents: Tony Venhuizen, Governor's Office
Shawn Lyons, South Dakota Retailers Association
Yvonne Taylor, SD Municipal League
David Owen, SD Chamber of Commerce & Industry

MOTION: AMEND SB 106

On the printed bill, delete everything after the enacting clause and insert:

" Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

- (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
- (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state

entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis. The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

- (1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;
- (2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;
- (3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;
- (4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;
- (5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;
- (6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;
- (7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;
- (8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;
- (9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

- (10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and
- (11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor."

Moved by: Brown
Second by: Holien
Action: Prevailed by voice vote.

MOTION: DO PASS SB 106 AS AMENDED

Moved by: Brown
Second by: Sutton
Action: Prevailed by roll call vote. (9-0-0-0)

Voting Yes: Hunhoff (Bernie), Sutton, Brown, Holien, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

SB 132: revise certain provisions regarding education funding.

Presented by: Tami Darnall, South Dakota Department of Education

MOTION: DO PASS SB 132

Moved by: Soholt
Second by: Solano
Action: Prevailed by roll call vote. (9-0-0-0)

Voting Yes: Hunhoff (Bernie), Sutton, Brown, Holien, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

SB 45: revise certain provisions of the building South Dakota fund programs.

Presented by: Pat Costello, Governor's Office of Economic Development

MOTION: AMEND SB 45

45ob

On page 4, line 11, of the printed bill, delete "shall" and insert "may".

On page 4, line 12, delete "shall" and insert "may".

Moved by: Brown
Second by: Soholt
Action: Prevailed by voice vote.

MOTION: AMEND SB 45

45ca

On page 2, line 10, of the printed bill, after "transfer" insert "and no valid applications were received in the previous year".

Moved by: Brown
Second by: Solano
Action: Was not acted on.

MOTION: SUBSTITUTE MOTION AMEND THE PENDING AMENDMENT

45oa

On page 2, line 10, of the printed bill, after "transfer" insert "and no valid applications were received in the previous quarter".

Moved by: Soholt
Second by: Holien

Action: Prevailed by voice vote.

MOTION: DO PASS SB 45 AS AMENDED

Moved by: Brown

Second by: Sutton

Action: Prevailed by roll call vote. (8-0-1-0)

Voting Yes: Sutton, Brown, Holien, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

Excused: Hunhoff (Bernie)

SB 139: revise certain provisions regarding the use tax.

Presented by: Senator Peterson (Jim)

Proponents: Andy Gerlach, Department of Revenue

Opponents: Drew Duncan, Trans Canada (Handouts: #1)
Steve Willard, South Dakota Electric Utility Companies
David Owen, SD Chamber of Commerce & Industry
Yvonne Taylor, SD Municipal League

MOTION: AMEND SB 139

139oa

On page 1 of the printed bill, delete lines 3 to 6, inclusive.

Moved by: Sutton

Action: Died for lack of a second.

MOTION: DEFER SB 139 TO THE 41ST LEGISLATIVE DAY

Moved by: Brown

Second by: Otten (Ernie)

Action: Prevailed by roll call vote. (7-1-1-0)

Voting Yes: Brown, Holien, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

Voting No: Hunhoff (Bernie)

Excused: Sutton

SB 143: require the Legislative Planning Committee to implement a performance management review process.

Presented by: Senator Vehle

MOTION: AMEND SB 143

143oa

On page 3, line 1, of the printed bill, delete "the members of the party caucuses" and insert "legislators".

Moved by: Solano
Second by: Brown
Action: Prevailed by voice vote.

MOTION: DO PASS SB 143 AS AMENDED

Moved by: Soholt
Second by: Holien
Action: Prevailed by roll call vote. (8-1-0-0)

Voting Yes: Sutton, Brown, Holien, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

Voting No: Hunhoff (Bernie)

SJR 4: Proposing and submitting to the electors at the next general election an amendment to Article IV, section 3 of the Constitution of the State of South Dakota, relating to the powers and duties of the Governor.

Presented by: Senator Greenfield (Brock)

MOTION: DEFER SJR 4 TO THE 41ST LEGISLATIVE DAY

Moved by: Solano
Second by: Soholt
Action: Prevailed by roll call vote. (8-1-0-0)

Voting Yes: Hunhoff (Bernie), Sutton, Brown, Otten (Ernie), Soholt, Tieszen, Solano, Cammack

Voting No: Holien

SB 164: revise certain residency requirements for voter registration.

Presented by: Senator Tieszen

MOTION: TO TABLE SB 164

Moved by: Otten (Ernie)

Second by: Soholt

Action: Prevailed by roll call vote. (8-1-0-0)

Voting Yes: Hunhoff (Bernie), Sutton, Brown, Holien, Otten (Ernie), Soholt, Tieszen, Cammack

Voting No: Solano

MOTION: ADJOURN

Moved by: Brown

Second by: Soholt

Action: Prevailed by voice vote.

Rena Ortbahn
Committee Secretary

Gary Cammack, Chair